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## BEFORE THE ARIZONA CORPORATION COMMISSION

2002 AUG -2 A 11: 24

WILLIAM A. MUNDELL Arizona Corporation Commission  
Chairman  
JIM IRVIN  
Commissioner  
MARC SPITZER  
Commissioner

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AZ CORP COMMISSION  
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In the matter of:

DOCKET NO. S-03450A-02-0000

Philip William Merrill  
3788 N. 156<sup>th</sup> Drive  
Goodyear, Arizona 85338  
CRD #2436444,

MOTION TO ALLOW  
TELEPHONIC TESTIMONY

Respondent.

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") hereby moves the Commission to allow telephonic testimony during the scheduled hearing in this matter. This motion is supported by the accompanying Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

## I. FACTS

The hearing in this matter is currently set to commence on August 26, 2002. The Division anticipates introducing the testimony of three witnesses, Catherine DuChene, Lori Mayfield and Sylvia Hays, by telephone. Catherine DuChene is the daughter of Beatrice DuChene, one of the five customers of Respondent included in the Notice of Opportunity For Hearing ("Notice") and a resident of California. Ms. DuChene spoke with Respondent a number of times involving her mother's securities accounts and certain transactions in the accounts. Although Ms. DuChene is expected to appear in person at the hearing, she is included in this motion in the unlikely situation that she cannot appear in person as planned. Lori Mayfield is a resident of California and has worked and lived there for at least the last two years. Sylvia Hays is a resident of Arizona who is currently out of the state on a previously planned vacation to visit family and to travel. Ms. Hays will not return to Arizona until after the hearing. Both Ms. Mayfield and Ms. Hays are former

1 customers of Respondent and are included in the Notice. All three of these witnesses will provide  
2 factual testimony probative of the allegations against Respondent in the Notice. Travel by these  
3 witnesses to Arizona to attend the hearing will be unduly burdensome and impractical in  
4 comparison to the time each is expected to testify, particularly for Ms. Hays.

5 If necessary, the Division may also call Keith Guilfoyle to appear by telephone as a witness  
6 at the hearing. Mr. Guilfoyle is an attorney with Morgan Stanley Dean Witter in the firm's New  
7 York City office. He can lay the foundation for any documents the Division received from  
8 Morgan Stanley Dean Witter and he can possibly answer any general questions about the  
9 documents or operations at the firm. At this time, the Division does not believe it will be  
10 necessary to call Mr. Guilfoyle as a witness at the hearing but includes him in this motion as a  
11 cautionary measure.

## 12 II. ARGUMENT

13 The purpose of administrative proceedings is to provide for the fair, speedy and cost  
14 effective resolution of administratively justiciable matters. To effectuate that purpose, the  
15 legislature provided for streamlined proceedings and relaxed application of the formal rules of  
16 evidence. Specifically, A.R.S. §41-1062(A)(1) provides for informality in the conduct of  
17 contested cases. The evidence submitted in an administrative hearing need not rise to the level of  
18 formality required in a judicial proceeding, as long as it is "substantial, reliable and probative."  
19 The Commission's rules of practice and procedure ensure just and speedy determination of all  
20 matters presented to it for consideration. See, A.A.C. R14-3-101(B); R14-3-109(K). Allowing  
21 Ms. DuChene, Ms. Mayfield, Ms. Hays and possibly Mr. Guilfoyle to testify by telephone retains  
22 all indicia of reliability and preserves Respondent's rights to cross-examination.

23 Courts in other states have acknowledged that telephonic testimony in administrative and  
24 civil proceedings is permissible and consistent with the requirements of procedural due process.  
25 See Babcock v. Employment Division, 72 Or.App. 486, 696 P.2d 19 (1985) (court approved  
26 Oregon Employment Division's procedure to conduct entire hearing telephonically); W.J.C. v.

1 County of Vilas, 124 Wis.2d 238, 369 N.W.2d 162 (1985) (court permitted telephonic expert  
2 testimony in commitment hearing). Both of these courts concluded that fundamental fairness  
3 weighed in favor of permitting telephonic testimony.

4 II. CONCLUSION

5 Permitting Ms. DuChene, Ms. Mayfield, Ms. Hays and Mr. Guilfoyle to testify  
6 telephonically at the hearing does not compromise Respondent's due process rights. Therefore,  
7 the Division respectfully requests that these witnesses be permitted to give telephonic testimony in  
8 this matter.

9 Respectfully submitted this 2nd day of August, 2002.

10 **Janet Napolitano**

11 Attorney General for the State of Arizona

12 

13 **Anthony B. Bingham**

14 Special Assistant Attorney General

15 **Moirra McCarthy**

16 Assistant Attorney General

17 Attorneys for the Securities Division of the  
18 Arizona Corporation Commission

19 Original and ten copies  
20 of the foregoing hand-delivered  
21 this 2nd day of August, 2002, to:

22 Docket Control  
23 Arizona Corporation Commission  
24 1200 West Washington Street  
25 Phoenix, AZ 85007

26 A copy of the foregoing faxed/mailed  
this 2nd day of August 2002, to:

Frank Lewis  
Begam Lewis Marks & Wolfe  
111 West Monroe Street, Suite 1400  
Phoenix, AZ 85003-1787

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